

Memorandum

To: Mr. Dean Kinnee, Chief (MIC:64)
County-Assessed Properties Division

Date: December 18, 2009

From: Andrew Jacobson
Tax Counsel

Subject: *Public Schools Exemption
Assignment No. 09-132*

This is in response to your memorandum of August 3, 2009, addressed to Mr. Randy Ferris, Assistant Chief Counsel, which was accompanied by a letter from _____ of the office of the Assessor for the County of Los Angeles. In your memorandum, you requested that we provide a legal opinion as to whether property owned by a charter school may qualify as property owned by a state or local government pursuant to California Constitution article XIII, section 3, subdivisions (a) and (b) and Revenue and Taxation Code¹ section 202, subdivision (a)(4). As explained in greater detail below, it is our opinion that property owned by charter schools that are operated by nonprofit organizations do not qualify as property owned by a state or local government.²

Analysis

California Constitution article XIII, section 1 provides that all property is subject to tax unless otherwise provided by the state constitution or the laws of the United States. California Constitution article XIII, section 3 provides in relevant part that:

The following are exempt from property taxation:

- (a) Property owned by the State.
- (b) Property owned by a local government, except as otherwise provided in Section 11(a). . . .
- (d) Property . . . used exclusively for public schools, community colleges, state colleges, and state universities.

The state and local government exemptions are codified in the Revenue and Taxation Code, at section 202, subdivision (a)(4). Additionally, it should be noted that the Legal Department has

¹ All statutory references are to the Revenue and Taxation Code unless otherwise indicated.

² We limit our analysis to a discussion of charter schools operated by nonprofit public benefit corporations.

already concluded that charter schools may qualify for the public schools exemption from property tax pursuant to California Constitution article XIII, section 3, subdivision (d) and section 202, subdivision (a)(3).³

We note initially that there is no specific authority clarifying whether charter schools are government entities for purposes of California Constitution article XIII, section 3, subdivisions (a) and (b). However, in our opinion, a review of relevant statutes and judicial opinions demonstrates that a charter school should not be considered a state or local government entity for property tax purposes.

It is true that a number of provisions in the Charter School Act of 1992 (Part 26.8 of the California Education Code) and subsequent amendments suggest that charter schools are part of the Public School System, and are considered to be state or local government entities for purposes of receiving state public education funds.⁴ Nevertheless, there are many other respects in which charter schools are treated differently than state or local government entities.⁵ Most importantly, Education Code section 47604 provides in pertinent part that charter schools may elect to operate as, or be operated by, a nonprofit public benefit corporation:

(a) Charter schools may elect to operate as, or be operated by, a nonprofit public benefit corporation, formed and organized pursuant to the Nonprofit Public Benefit Corporation Law (Part 2 (commencing with Section 5110) of Division 2 of Title 1) of the Corporations Code).

(b) The governing board of a school district that grants a charter for the establishment of a charter school formed and organized pursuant to this section shall be entitled to a single representative on the board of directors of the nonprofit public benefit corporation.

The California Supreme Court emphasized the autonomy of charter schools from state and local government control in *Wells v. One2One Learning Foundation*.⁶ In *Wells* the Court found that while public school districts were exempt from liability under the California False Claims Act (CFCA), charter schools were not considered to be state or local government entities for liability purposes and, hence, were subject to liability under both the CFCA and the unfair competition law (UCL).⁷ The Court noted that charter schools are operated by nonprofit organizations, which are administratively separate from state and local government:

³ See Annotation 690.0003.

⁴ See, for example, Educ. Code, § 47615, subd (a)(2) (“Charter schools are under the jurisdiction of the Public School System and the exclusive control of the officers of the public schools, as provided in this part.”); Educ. Code, § 47612, subd. (a) (“A charter school shall be deemed to be under the exclusive control of the officers of the public schools for purposes of Section 8 of Article IX of the California Constitution, with regard to the appropriation of public moneys to be apportioned to any charter school, including, but not limited to, appropriations made for the purposes of this chapter.”); *Wilson v. State Board of Education* (1999) 75 Cal.App.4th 1125, 1140 (“Charter school officials are officers of public schools to the same extent as members of other boards of education of public school districts.”).

⁵ See, for example, Educ. Code, § 47604, subd. (c) (chartering authorities not liable for acts committed by charter schools under their supervision as long as chartering authority performs due diligence); Educ. Code, § 47604.32 (annual inspections of charter school by chartering authority); Educ. Code, § 47604.33 (charter schools must submit budgets to chartering authorities).

⁶ *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1196-1197.

⁷ *Id.* at pp. 1202-1204.

Though charter schools are deemed part of the system of public schools for purposes of academics and state funding eligibility, and are subject to some oversight by public school officials, *the charter schools here are operated, not by the public school system, but by distinct outside entities-* which the parties characterize as nonprofit corporations- that are given substantial freedom to achieve academic results free of interference by the public educational bureaucracy. *The sole relationship between the charter school operators and the chartering districts in this case is through the charters governing the schools' operation.*⁸ (Emphasis added.)

In reaching its decision, we also note that the Court emphasized that state funding for public education would be endangered by subjecting public school districts to liability under these provisions.⁹

It is our opinion that the issue of control, which played a prominent role in the California Supreme Court's analysis in the *Wells* opinion, should similarly affect whether a charter school qualifies as state or local government-owned property for property tax purposes. While a charter school is part of the public school system, charter schools have "operational independence" from public school districts.¹⁰ This means that outside of the period in which the chartering authority is carrying out its supervisory duties, charter schools operate largely free from government supervision. Nor must the chartering authority necessarily have an ownership interest in the charter school. Additionally, the Legislature has expanded oversight requirements, which indicates that chartering authorities need more interaction with charter schools to oversee what are generally separate nonprofit entities.¹¹

Moreover, some of the fiscal concerns voiced by the California Supreme Court in *Wells* may be at issue in this case.¹² Because the Legal Department has already concluded that charter schools are public schools for purposes of the public schools exemption,¹³ the inclusion of charter schools under the state and local government-owned property exemptions would likely not affect property tax collections. Nevertheless, categorizing charter schools as state or local government entities for property tax purposes could reduce the payment of special assessments by charter schools.¹⁴

It should also be noted that assessors provide greater procedural protections for property exempted under the public schools exemption than for property that falls under the state and local government-owned property exemptions. Owners or users of public school exempt

⁸ *Id.* at pp. 1200-1201.

⁹ *Id.* at p. 1195.

¹⁰ *Wilson v. State Board of Education*, *supra*, 75 Cal.App.4th at p. 1139.

¹¹ See Stats. 2003 ch. 892, § 1, subd. (c) ("The Charter Schools Act of 1992 shall be interpreted to further its purpose as a performance-based accountability system.")

¹² *Wells v. One2One Learning Foundation*, *supra*, 39 Cal.4th at p.1195.

¹³ See Annotation 690.0003.

¹⁴ The California Supreme Court has construed California Constitution article XIII, section 3, subdivisions (a) and (b) as exempting state and local government from special assessments (although not from "user fees"). See *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 422. California Constitution article XIII D, section 2, subdivision (b) defines "assessment" as ". . . any levy or charge upon real property by an agency for a special benefit conferred upon the real property. 'Assessment' includes, but is not limited to, 'special assessment,' 'benefit assessment,' 'maintenance assessment' and 'special assessment tax.'" (Emphasis added.)

property must file an annual exemption claim,¹⁵ while state and local governments need not file annual exemption claims. Therefore, we believe that county assessors should continue to annually review the exemptions of charter school property owned by nonprofit organizations to ensure that such property continues to be used exclusively for public schools purposes as required by California Constitution article XIII, section 3, subdivision (d).

Finally, because nonprofit public benefit corporations are legally separate entities from state and local governments, it would be inconsistent with our past opinions to allow government entities to pass on their California Constitution article XIII, section 3, subdivisions (a) and (b) exemptions to such corporations.¹⁶ For example, the Legal Department has long maintained that a corporation 100-percent controlled by a government agency could not qualify for the local government exemption.¹⁷ Indeed, chartering authorities have far less direct authority over charter schools operated by nonprofit organizations than do local governments over wholly-owned municipal corporations. Under Education Code section 47604, subdivision (b), chartering authorities have a right to place a single representative on the board of the nonprofit (although there is no requirement that it do so), which is a far less substantial interest than 100 percent control by the state or local government.

Therefore, we conclude that a charter school operated by a nonprofit public benefit corporation is not a state or local government entity and, therefore, may not qualify under California Constitution article XIII, section 3, subdivisions (a) and (b).

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¹⁵ Rev. & Tax. Code, § 254.

¹⁶ See Annotations 490.0045, 880.0042 and 880.0043.

¹⁷ Annotation 490.0065.